AUG 4 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 39

RICHARD HALL and CHRISTINE HALL,

Appellants,

—v.—

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,

Appellees.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO, *AMICI CURIAE*

EDMUND J. WOOD
CHARLES E. ENGART
2101 Smith Tower
Seattle, Washington 98104

WILLIAM E. REYNARD
507 American National Bank Bldg.
Denver, Colorado 80202

MELVIN L. WULF
EVANSON HOLMES NORTON
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for Amici Curiae

INDEX

PAGE

Interest of *Amici Curiae* 1

Summary of Argument 2

ARGUMENT

I. The right to vote in presidential elections is a right protected by the First Amendment from abridgement by the states, except in cases of compelling state interests 4

A. The Right to Vote Is Inherent in the Political Freedom Protected by the Rights of Speech, Press, Assembly, and Petition Guaranteed by the First Amendment 4

B. Voting Is a Form of Assembly and Association 6

C. Voting Is a Form of Petitioning for Redress of Grievances 12

D. No Compelling State Interest Exists to Justify Denial of Appellants' Right to Vote 13

E. Article II, Section 1 Does Not Limit Appellants' Right to Vote for Presidential Electors 19

II. The right to vote for President and Vice-President is a privilege of national citizenship and is abridged by Colorado's residence requirement 21

PAGE

III. Denial of the Presidential franchise for failure to satisfy a durational residence requirement violates the appellants' constitutional right of interstate travel 22

IV. Durational residence requirements for voting deny the equal protection of the laws to the appellants 24

V. The case is not moot and the important questions it raises should be considered 29

Conclusion 33

Table of Authorities

Cases:

Allgeyer v. Louisiana, 165 U.S. 578 (1897) 23
Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 397 U.S. 308 (1968) 5
Aptheker v. Secretary of State, 378 U.S. 500 (1964) 23, 24, 29
Ashby v. White, 2 Ld. Raym. 938 (1703) 10, 33

Bates v. City of Little Rock, 361 U.S. 516 (1960) 6, 17
Baxstrom v. Herold, 383 U.S. 107 (1966) 24
Blake v. McClung, 172 U.S. 239 (1898) 27
Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964) 6, 18, 20
Brown v. United States, 334 F.2d 488 (9th Cir. 1964), aff'd, 381 U.S. 437 (1965) 11
Burroughs v. United States, 290 U.S. 534 (1934) 9, 21

PAGE

Carrington v. Rash, 380 U.S. 89 (1965) 14, 16, 27, 28, 29, 31
Carroll v. Princess Anne, 393 U.S. 175 (1968) 10
Cipriano v. City of Houma, —— U.S. ——, 89 S. Ct. 1897 (1969) 17
Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823) 23
Crandall v. Nevada, 6 Wall. (73 U.S.) 35 (1868) 23

De Jonge v. Oregon, 299 U.S. 353 (1937) 4, 6, 10
Dombrowski v. Pfister, 380 U.S. 479 (1965) 32
Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), aff'd per curiam, 380 U.S. 125 (1965) 27
Duncan v. Missouri, 152 U.S. 377 (1894) 21
Dyana v. California, 332 U.S. 633 (1948) 27

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 5, 10
Ebel v. Drum, 52 F. Supp. 189 (D. Mass. 1943) 23
Edwards v. California, 314 U.S. 160 (1941) 23
Elfbrandt v. Russell, 384 U.S. 11 (1966) 6, 18
Ex parte Siebold, 100 U.S. 371 (1880) 21
Ex parte Yarbrough, 110 U.S. 651 (1884) 21

Fields v. Fairfield, 375 U.S. 248 (1963) 10
Flast v. Cohen, 392 U.S. 83 (1968) 30
Fleming v. Nestor, 363 U.S. 603 (1960) 24-25

Gibson v. Florida Legislative Investigation Committee, 272 U.S. 539 (1963) 6, 13, 16, 17
Giozza v. Tiernan, 148 U.S. 657 (1893) 21
Griswold v. Connecticut, 381 U.S. 479 (1965) 4, 6

PAGE

Harman v. Forssenius, 380 U.S. 528 (1965) 23, 26-27
Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) 23, 29
Herndon v. Lowry, 301 U.S. 242 (1937) 10

In re Kemmler, 136 U.S. 436 (1890) 21

Katzenbach v. Morgan, 384 U.S. 641 (1966) 32
Kent v. Dulles, 357 U.S. 116 (1958) 23
Kramer v. Union Free School Dist. 15, —— U.S. ——, 89 S. Ct. 1886 (1969) 13, 14, 17

Lathrop v. Donohue, 10 Wis.2d 230, 102 N.W.2d 404 (1960), aff'd, 367 U.S. 820 (1961) 11
Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911) 24
Louisiana ex rel. Gremillion v. N.A.A.C.P., 366 U.S. 293 (1961) 6

Mauff v. People, 52 Colo. 562, 123 Pac. 101 (1912) 25
McCulloch v. Maryland, 4 Wheat. 316 (1819) 8
McGowan v. Maryland, 366 U.S. 420 (1961) 24, 25
McPherson v. Blacker, 146 U.S. 1 (1892) 5, 19, 21, 22
Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) 8-9
Moore v. Ogilvie, —— U.S. ——, 89 S. Ct. 1493 (1969) 17, 20, 31

N.A.A.C.P. v. Alabama ex rel. Flowers, 377 U.S. 288 (1964) 6, 18
N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 6, 17
N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 6, 13, 14, 17
New York Times v. Sullivan, 376 U.S. 254 (1964) 5, 18, 19

PAGE

Penhallow v. Doane, 3 U.S. 53 (3 Dall. 54) (1795) 8

Reynolds v. Sims, 377 U.S. 533 (1964) 13
Roth v. United States, 354 U.S. 476 (1957) 5

Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957) 10
Shapiro v. Thompson, —— U.S. ——, 89 S. Ct. 1322 (1969) 22-23, 25
Shelton v. Tucker, 364 U.S. 479 (1960) 6, 10, 17
Slaughter-House Cases, 16 Wall. (83 U.S.) 36 (1873) 21
Spriggs v. Clark, 45 Wyo. 62, 14 P.2d 667 (1932) 12
Stromberg v. California, 283 U.S. 359 (1931) 5, 8

Texas v. White, 74 U.S. (7 Wall.) 700 (1869) 8
Thomas v. Collins, 323 U.S. 516 (1945) 4, 5, 10, 13
Twining v. New Jersey, 211 U.S. 78 (1908) 21, 23

United Mine Workers v. Illinois State Bar Assn., 389 U.S. 217 (1967) 6, 18, 19
United States v. Bathgate, 246 U.S. 220 (1918) 21
United States v. Cruikshank, 92 U.S. 542 (1876) 8
United States v. Fruehauf, 365 U.S. 146 (1961) 32
United States v. Guest, 383 U.S. 745 (1966) 22, 23
United States v. Korner, 56 F. Supp. 242 (S.D. Cal. 1944) 10
United States v. Moore, 129 Fed. 630 (N.D. Ala. 1904) 21, 23
United States v. Wood, 295 F.2d 772 (5th Cir. 1961) 8

West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943) 13

PAGE

Williams v. Fears, 179 U.S. 270 (1900) 23
Williams v. Rhodes, 393 U.S. 23 (1968) 6, 11, 13, 17, 18, 20, 31

Zemel v. Rusk, 381 U.S. 1 (1965) 23

Constitutional Provisions:

Colorado Constitution

Article II, Section 1 8

United States Constitution

Article I, Section 8 31
Article II, Section 1 ..... 19, 20, 21, 31
Article IV, Section 2 27
Article IV, Section 4 19
First Amendment 2, 4, 5, 9, 13, 20, 24, 30, 31
Fifth Amendment 23
Fourteenth Amendment 3, 9, 20, 21, 23, 24, 31
Twenty-fourth Amendment 20

Colorado Statutes:

Colorado Revised Statutes:

49-3-3 15
49-5-1 11
49-5-2 11
49-13-1 11
49-20-1 20
49-21-4 15
49-21-6 15

PAGE

49-21-7 15
49-21-8 15
49-21-9 15
49-21-10 15
49-21-11 15
49-21-13 15
49-21-14 15
49-21-22 ..... 15, 16
49-21-23 15
49-21-34 15
49-21-35 15
49-21-36 15
49-21-37 15
49-24-1 ..... 3, 29
49-24-10 15

Federal Statutes:

Section 4(e) of the Voting Rights Act of 1965 ..... 31, 32

Other Authorities:

Mayflower Compact in 1 Documents on Fundamental Human Rights; 1067 (Z. Chafee, Jr., ed.) (Athenaeum ed. 1963) 6

Fundamental Orders of Connecticut in Z. Chafee, Jr., supra note 1, at 1163] 7

J. Locke, The Second Treatise on Government (1764), The Liberal Arts Press, Inc., New York, 1952

Ch. VIII, Sec. 97, p. 55 7

Ch. VIII, Sec. 99, p. 56 7

Ch. XIX, Sec. 212, p. 120 7

PAGE

Chaffee, Three Human Rights in the Constitution of 1787, 162 (1956) 23

Comment, 77 Harv. L. Rev. 574 (1964) 28

Note, Federal Elections—The Disfranchising Residence Requirement, 1962 U. Ill. Law Forum 101 28

Goldman, Move—Lose Your Vote, 45 National Municipal Rev. 6 (1956) 28

Kefauver, Electoral College: Old Reforms Take on a New Look, 27 Law and Contemp. Prob. 188 (1962) 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

BERNICE HAYE and CONSTANCE HAYE,

Appellants,

v.

HARDY BEATY, Clerk and Recorder of El Paso County, and ROSE TYLER, Election Supervisor of El Paso County,

Appellees.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO, *AMICI CURIAE*

Interest of *Amici Curiae*

The interest of the American Civil Liberties Union and its Colorado affiliate stems from their work as civil liberties organizations. Since its founding in 1920, the American Civil Liberties Union has sought to prevent and to redress violations of civil liberties protected by the United States Constitution, through litigation, educational programs, public statements, and petitions to the government. Its intention has never been to profit financially from its work or to further the interest of any special group, but rather, to defend the civil liberties of all persons equally. It is hoped that the arguments here presented, as an organization experienced and specially concerned with mat-

taining constitutionally guaranteed liberties may be of aid to the Court in its adjudication of the fundamental issues raised in this case.*

Summary of Argument

This case raises important questions as to the means of selecting the President, the extent of the states' power to determine how the President is chosen, and the nature of national citizenship. Jones asserts that Colorado's durational residence requirement for voting in Presidential elections is unconstitutional.

Jones first contends that the right of a citizen to vote in a Presidential election held by a state is inherent in the political freedom protected by the First Amendment and that it is rooted in the rights of speech, press, assembly, petition and association. Further, Jones asserts that voting is a form of political association in the broad political and that it is the means of securing the consent of the people essential to the responsiveness of the government to its people's will and essential to its continued legitimacy. No interest of the state in preventing fraud, in the administration of church related districts, or in having a locally established electorate can justify the broad prophylactic restraint imposed on the right to vote for President.

Both the right to vote for Presidential electors and the right to travel interstate must be considered principles and immunities of national citizenship and are therefore protected from infringement by the state exercising [illegible]

* Letters of consent to the filing of this brief have been filed with the Clerk of Court.

pelling state interests which, as pointed out, do not exist in this case. Similarly, because durational residence requirements for presidential voting single out a group of voters for differential treatment and thereby either penalize the exercise of the would-be voters' right to travel or inhibit the exercise of the would-be traveler's right to vote, the Equal Protection Clause of the Fourteenth Amendment requires that the extraordinary decree withstand the closest scrutiny and promote compelling state interests.

Finally, although appellants are now eligible to register to vote in Colorado for President, other people will be disqualified at future presidential elections. Neither the passage of time nor the reduction of the length of required residence will cure such cases. Appellants have a continuing interest in having the electoral system operate properly, and a coordinate interest in preventing political strife with other disqualified voters at future presidential elections.

ARGUMENT

I.

The right to vote in presidential elections is a right protected by the First Amendment from abridgement by the states, except in cases of compelling state interests.

A. *The Right to Vote Is Inherent in the Political Freedom Protected by the Rights of Speech, Press, Assembly, and Petition Guaranteed by the First Amendment*

The First Amendment is "a charter for government." *Thomas v. Collins*, 323 U. S. 516, 537 (1945). Although its protection extends to purely private interests, such as marital privacy, *Griswold v. Connecticut*, 381 U. S. 479 (1965), the basic function of the guarantees of speech, press, assembly, and petition is to protect the political freedom of citizens from erosion by government action. The political freedom protected by the First Amendment includes relations with the federal government, as well as the states.

The First Amendment rights of speech, press, assembly, and petition are "cognate" rights having a common origin in the political freedom of the people. *Thomas v. Collins*, 323 U. S. 516 (1945); *De Jonge v. Oregon*, 299 U. S. 353 (1937). First Amendment rights are not ends in themselves, but are protected in order to preserve the right of the people to exercise fully and effectively their political power. If the right to vote were not constitutionally guaranteed, the rights of speech, press, assembly, and petition

could be reduced by the states to a right to engage in futile rhetoric.

But more than that is intended by the First Amendment. It protects not simply the right to speak and assemble, but to speak and assemble effectively. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968). It protects not only the right to state facts, but also "the opportunity to persuade to action." *Thomas v. Collins*, 323 U. S. 516, 537 (1945). The object of its guarantee of political freedom is to assure that government is "responsive to the will of the people," and to enable the people to bring about desired political and social changes. *Stromberg v. California*, 283 U. S. 359, 369 (1931); *Roth v. United States*, 354 U. S. 476, 484 (1957). Specifically, the protections of that amendment relate to the right to persuade elected officials to enact legislation, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), and of the people in a democracy to use "ballots" to express their political views about public officials. *New York Times v. Sullivan*, 376 U. S. 254, 299 (1964) (Goldberg, J., concurring). The selection of the President is a form of "expression of the views of the people." *McPherson v. Blacker*, 146 U. S. 1, 26 (1892).

The right to vote, although not specifically mentioned in the First Amendment, is essential to the "security and efficacy" of those rights that are mentioned. Voting is the final and authoritative act of political expression which gives the exercise of the rights of speech, press, assembly, and petition their potential for effectiveness, and thus in connection with their political character. The right to vote is therefore inherent in the First Amendment idea of political freedom and expression. Though not specifically men-

tioned, it is within the penumbra of that amendment necessary for the presentation and effectiveness of those rights specifically mentioned. See *Griswold* v. *Connecticut*, 381 U. S. 479 (1965).

B. *Voting Is a Form of Assembly and Association*

Peaceful physical assemblies have long been protected from abridgement by the states. *De Jonge* v. *Oregon*, 299 U. S. 353 (1937). More recently, constitutional protection has been extended to non-physical assemblies, in the developing right of "association." See *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *United Mine Workers* v. *Illinois State Bar Association*, 389 U. S. 217 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *N. A. A. C. P.* v. *Alabama ex rel. Flowers*, 377 U. S. 288 (1964); *Brotherhood of R. R. Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964); *Gibson* v. *Florida Legislative Investigative Committee*, 372 U. S. 539 (1963); *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963); *Louisiana ex rel. Gremillion* v. *N. A. A. C. P.*, 366 U. S. 293 (1961); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Bates* v. *City of Little Rock*, 361 U. S. 516 (1960); *N. A. A. C. P.* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958).

The association of sovereign individuals to form a body politic is the most basic form of "peaceable assembly." The idea of the state as an assembly, association, or combination of sovereign individuals can be traced from the earliest American political institution, the Mayflower Compact of 1620,[1] and from the Fundamental Orders of Con-

[1] "We . . . doe by these presents solemnly & mutualy in the presence of God, and one of another, covenant & combine our selves togeather into a civill body politick, for our better ordering & preservation & furtherance of the ends aforesaid . . ." Mayflower Compact, in 1 Documents on Fundamental Human Rights, 106-7 (Z. Chafee, Jr., ed.) (Atheneum ed. 1963).

necticut of January 24, 1639.[2] At the root of this conception of government is the necessity of securing the consent of the people.[3] The Declaration of Independence states the fundamental premise of American politics that "Governments are instituted among Men, deriving their just

[2] ". . . we the Inhabitants and Residents of Windsor, Harteford, and Wethersfield . . . doe therefore assotiate and conjoyne our selves to be as one publike State or Commonwealth; and doe . . . enter into Combination and Confederation togather . . . " Z. Chaffe, Jr., *supra*, Fundamental Orders of Connecticut, 116-17.

[3] Locke, to whom Jefferson and the framers of the Constitution were indebted, described the social compact this way:

> And thus every man, by thus consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority and be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact, if he be left free and under no other ties than he was in before in the state of nature."

J. Locke, The Second Treatise on Government (1764), Ch. VIII, Sec. 97, The Liberal Arts Press, Inc.; New York, 1952, 55.

> And this is done by barely agreeing to unite into one political society, which is all the compact that is, or needs be, between the individuals that enter into and make up a commonwealth. And thus that which begins and actually constitutes any political society is nothing but the consent of any number of freemen capable of a majority to unite and incorporate into such a society.

J. Locke, The Second Treatise on Government (1764), Ch. VIII, Sec. 99, The Liberal Arts Press, Inc., New York, 1952, 56.

> The constitution of the legislative is the first and fundamental act of society, whereby provision is made for the continuation of their union under the direction of persons and bonds of laws made by persons authorized thereunto by the consent and appointment of the people, without which no one man or number of men amongst them can have authority of making laws that shall be binding on the rest. When any one or more shall take upon them to make laws, whom the people have not appointed so to do, they make laws without authority, which the people are not therefore bound to obey.

J. Locke, The Second Treatise on Government (1764), Ch. XIX, Sec. 212, The Liberal Arts Press, Inc., New York, 1952, 120.

powers from the consent of the governed," a premise repeated in the constitutions of many of the states.[4] See also *Texas* v. *White,* 74 U. S. (7 Wall.) 700, 721 (1869); *United States* v. *Wood,* 295 F. 2d 772, 784 (5th Cir. 1961).

The continued legitimacy and security of government depend ultimately upon its preservation of political freedom and upon its responsiveness to the continued expression of consent or dissent of the people. See *Stromberg* v. *California,* 283 U. S. 359, 369 (1931). The control retained by the people over their elected representatives is their "security" for the proper exercise of sovereignty surrendered to the state, and is a condition of the basic social compact. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 428 (1819). Voting is the institutionalized means for the people to express their consent, and it is, therefore, the continuous process by which the people participate in the legitimization of government, in the basic social compact, and in the peaceable assembly and association of individuals in the body politic.

The United States is a government based on these principles. It is a union not only of the states, but of the people. See *United States* v. *Cruikshank,* 92 U. S. 542, 549-550 (1876); *Texas* v. *White,* 74 U. S. (7 Wall.) 700, 720-721 (1869); and *Penhallow* v. *Doane,* 3 U. S. 53, 93-94 (3 Dall. 54) (1795).[5] In *Minor* v. *Happersett,* 88 U. S.

[4] E.g., the Colorado Constitution, Art. II, Sec. 1, which provides:

> All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

[5] Significantly, the Preamble to the Constitution provides that "We the People of the United States . . . do ordain and establish this constitution for the United States of America."

(21 Wall.) 162, 165-166 (1875), the Court spoke expressly of this association:

> There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association.

In *United States* v. *Cruikshank*, 92 U. S. 542, 549 (1876), Mr. Chief Justice Waite stated:

> 'Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights.

The right of members of the national political community to vote for the President and the Vice-President of the United States is part of the national social compact. Without that right in the people, the United States would lack the consent which is the basis for its legitimacy.

The right to vote for President has been recognized as a "privilege" of citizens of the United States. See *Burroughs* v. *United States*, 290 U. S. 534 (1934). While the Privileges and Immunities Clause of the Fourteenth Amendment protects this right to vote for President and Vice-President from abridgement by the states, the source of the right is in the freedom of association and the political freedom secured by the First Amendment.

The assembly of votes together is another means of association, involving elements of speech, assembly, and petition and demonstrating the cognate nature of these rights and their function in practice, of giving effect to political expression.[6]

Other forms of political association are protected by the Constitution, and are inhibited and chilled by the denial of the right to vote. These include the association of individuals for the purpose of promoting the passage of legislation for the relief of the poor, *Herndon* v. *Lowry,* 301 U. S. 242 (1937), or for the purpose of encouraging the enactment of legislation aimed at destroying economic competitors, *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961). Also protected is the right of individuals to associate with and to act peacefully for political parties, organized to promote Marxism, *Herndon* v. *Lowry,* 301 U. S. 242 (1937); *De Jonge* v. *Oregon,* 299 U. S. 353 (1937), or Nazism, *United States* v. *Korner,* 56 F. Supp. 242 (S. D. Cal. 1944), or racism, *Fields* v. *Fairfield,* 375 U. S. 248 (1963); *Carroll* v. *Princess Anne,* 393 U. S. 175 (1968).

Membership in a political party is a form of association protected from being stifled even to promote arguably valid state interests. See *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960); *Schware* v. *Board of Bar Examiners,* 353 U. S. 232 (1957); and *Thomas* v. *Collins,* 323 U. S. 516 (1945). Holding elective office in a labor union, and voting for elective officers in a bar association may both be

---

[6] At one time, it appears, voters were physically assembled together at the time and place of an election, prior to the taking of the poll. See *Ashby* v. *White,* 2 Ld. Raym. 938, 950 (1703) (Holt, *C.J.*, dissenting). The New England town meeting is a closely related institution.

forms of the exercise of the right of association. See *Brown* v. *United States,* 334 F. 2d 488 (9th Cir. 1964), affirmed 381 U. S. 437 (1965); and *Lathrop* v. *Donohue,* 10 Wis. 2d 230, 102 N. W. 2d 404 (1960), affirmed 367 U. S. 820 (1961).[7] Freedom of association also protects the efforts of a political party to seek the votes of the public by placing on the ballot the name of its Presidential candidate. *Williams* v. *Rhodes,* 393 U. S. 23 (1968).

Denial of the right to vote is not only a practical inhibition on the exercise of the right to associate with a political party; in some states it is a legal impediment to party affiliation in internal party affairs. In Colorado, for instance, people who do not meet the durational residence requirement can neither vote in the general, primary, or special elections[8] nor can they be affiliated with a political party or vote in any precinct caucus, assembly, or convention of a political party.[9] The durational residence re-

---

[7] In *Lathrop,* the Wisconsin Court held that the integrated bar rule did not require compulsory association because "the rules and by-laws of the State Bar . . . do not compel the plaintiff to associate with any one. He is free to attend or not attend its meeting or vote in its elections as he chooses." 10 Wis. 2d 230, 102 N. W. 2d at 408.

[8] Colo. Rev. Stat. 49-13-1 provides:

> No person shall be permitted to vote at any general, primary, or special election unless his name is found in the registration book . . .

[9] Colo. Rev. Stat. 49-5-1 provides:

> No elector shall vote at any precinct caucus, assembly, or convention of a political party unless such elector shall have been affiliated with the political party holding the caucus, assembly or convention for at least twelve months as shown on the registration books of the county clerk . . . .

Colo. Rev. Stat. Sec. 49-5-2 provides:

> Any unaffiliated registered elector may declare his party affiliation at the time he presents himself to vote at a primary

quirement chills and inhibits the exercise of these associational rights.

C. *Voting Is a Form of Petitioning for Redress of Grievances*

The right to petition for redress of grievances includes the right to vote. See *Spriggs* v. *Clark*, 45 Wyo. 62, 14 P. 2d 667 (1932).

The issues at stake in a Presidential election touch on the survival of the nation and concern the well-being of all the people. The opportunity to vote for President is an opportunity to express effectively grievances about any of the matters within the vast powers of the Presidency, the power to administer the laws, to make judicial and executive appointments, to initiate legislative programs, to substantially influence the economy of the private sector, to act as commander-in-chief, to conduct foreign policy, and to administer an annual budget of almost $200 billion. Not infrequently, citizens have grievances about the exercise of these powers, and have neither influence nor an effective way to present their grievance, except at the polls.[10] Denial of the right to vote for Presi-

---

election, as provided in section 49-8-6(1); or by appearing in person before the registration committee at precinct registration; or at any time during which electors are permitted to register by appearing in person before the county clerk or by filing a form which shall be furnished by the county clerk at the request of the elector. Any registered elector who has not declared a party affiliation shall be designated on the registration books of the county clerk as "unaffiliated."

[10] The 1968 New Hampshire Democratic Presidential primary is an example of large numbers of voters voting in a Presidential primary election with a common grievance, the conduct of the war in Vietnam.

dent and Vice-President is an abridgement of this important means of petitioning for redress of grievances.

D. *No Compelling State Interest Exists to Justify Denial of Appellants' Right to Vote*

Statutes restricting the exercise of the right of assembly and other rights protected by the First Amendment are entitled to no presumption of validity, and the burden of establishing their validity is on the party seeking to enforce them. *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539, 546 (1963); *Thomas* v. *Collins,* 323 U. S. 516, 529, 530 (1945). Similarly, restrictions on the exercise of voting rights are not presumptively valid. *Kramer* v. *Union Free School District 15,* —— U. S. ——, 89 S. Ct. 1886 (1969). Restrictions and infringements placed on the right to vote by the states "must be carefully and meticulously scrutinized." *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964).

Restrictions on rights emanating from the First Amendment require more than a rational basis; they must be based upon "clear and present danger" of public disorder, *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945), upon their tendency to produce "grave and immediate danger" to legitimate state interests, *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943), or upon a "compelling state interest," *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 438 (1963). The same "compelling state interest" test, applied to infringements on the rights of association and petition in *Button,* were applied to restrictions on the right to vote in *Williams* v. *Rhodes,* 393 U. S. 23, 31 (1968).

Whether appellant's interest is viewed solely as a right to vote, or as a right of association, the infringement posed

by Colorado's durational residence requirement must be based on a showing of necessity to protect a "compelling state interest." Furthermore, whether appellant's interest is in voting or in associating or petitioning, the restriction may be no broader than is necessary to protect whatever legitimate interest the state may be able to demonstrate it has. *Kramer* v. *Union Free School District 15*, —— U. S. ——, 89 S. Ct. 1886 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965); *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963).

Three kinds of interests might conceivably be related to Colorado's durational residence requirement for Presidential elections; first, that it assists in preventing fraudulent registration and voting by persons who are not actually residents; second, that it assists in preventing "colonization," or the importation of persons to vote in a closely contested district; and third, that it tends to assure that voters have been exposed to the community long enough to be familiar with its problems and with the position of the candidates on matters of special interest to the State of Colorado.

As to the first, the interest in preventing fraudulent elections is no doubt a legitimate interest of the state, and the question is whether a six-month or ninety-day durational residence requirement is broader than is necessary to deal with the problem. Unless it is supposed that every new resident made ineligible to vote because of the durational residence requirement would perpetrate some form of election fraud if allowed to vote, the requirement is too broad. It disenfranchises honest voters, while protecting the state only from those scarce potential voters willing to commit perjury on the question of residence

but unwilling to do so on the question of durational residence. A narrower protection, aimed specifically at offenders, exists in the form of Colorado statutes making fraudulent voting a misdemeanor.[11]

As to the problem of "colonization," it surely cannot be assumed that every new resident voting in a Presidential election in Colorado has come there for the purpose of improperly influencing its Presidential election vote. Colorado has statutes defining the concept of residence for purposes of elections, which are less burdensome on the exercise of the right to vote than is the durational residence requirement.[12] Colorado also has a penal statute

---

[11] E.g., Colo. Rev. Stat. 49-21-4, Penalties for election offenses; 49-21-6, Perjury; 49-21-7, Forgery; 49-21-8, Interfering with or impeding registration; 49-21-9, Interfering with election officer; 49-21-10, Interfering with watcher; 49-21-11, Violation of duty; 49-21-13, Unlawful qualification as taxpaying elector; 49-21-14, Procuring false registration; 49-21-22, Unlawful giving or promising money; 49-21-23, Unlawful receipt of money; 49-21-34, Unlawful refusing or permitting to vote; 49-21-35, Voting in wrong precinct; 49-21-36, Personating elector; 49-21-37, Voting twice; 49-24-10, Penalties.

[12] Colo. Rev. Stat. 49-3-3:

> Rules for determining residence.—(1) (a) The judges of election in determining the residence of a person offering to vote shall be governed by the following rules, so far as they may be applicable:
>
> (b) That place shall be considered to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning;
>
> (c) A person shall not be considered to have lost his residence who shall leave his home and go into another state . . ., merely for temporary purposes with an intention of returning;
>
> (d) A person shall not be considered to have gained a residence in this state, or in any county in this state, when retaining his home or domicile elsewhere;
>
> (e) If a person moves to any other state, or to any of the territories, with the intention of making it his permanent

in regulating the practice of law, *Brotherhood of R.R. Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964); in protecting citizens and officials of the state from notoriety and attention, from bus boycotts and from false charges of official misconduct, *N. A. A. C. P.* v. *Alabama ex rel. Flowers*, 377 U. S. 288 (1964); in having public school teachers who support the Constitution and laws and are not members of the Communist Party or any organization planning to overthrow the government by force, *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); in preventing the possibility of harm to the public from lawyers with conflicting interests, *United Mine Workers* v. *Illinois State Bar Association*, 389 U. S. 217 (1967); and in promoting a two-party system and attempting to insure that the winning Presidential candidate receives a majority, rather than merely a plurality, *Williams* v. *Rhodes*, 393 U. S. 23 (1968).

The interests which may be relied on by Colorado to justify its durational residence requirement are not of the importance of many of those alleged in the association cases and found by the Court to be inadequate.

Finally, the idea that voters may be required to have some particular degree of knowledge about local problems in order to be able to vote for President is at variance with the principle of maximum freedom of political expression announced in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964). In voting, as in speech, press, petition, and other forms of political expression, an intolerance for error is stifling to society, and "[t]he constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'

N. A. A. C. P. v. Button, 371 U. S. 415, 455." *New York Times* v. *Sullivan*, 376 U. S. 254, 271 (1964).

E. *Article II, Section 1 Does Not Limit Appellants' Right to Vote for Presidential Electors*

The language of Paragraph 2 of Art. II, Section 1 of the Constitution providing for appointment of Presidential electors by the States, "in such manner as the legislature thereof may direct," has been the basis for a number of diverse schemes for choosing electors, in many cases by the legislatures or persons appointed by the legislatures for the purpose of choosing electors, and not by popular vote. See *McPherson* v. *Blacker*, 146 U. S. 1 (1892). It may be argued that the Colorado legislature is authorized by this provision to direct that Presidential electors be chosen by popular vote, without the votes of persons who do not meet its durational residence requirements. The argument is unsound for two reasons.

First, although every particular election held under state auspices may not be constitutionally required by either the First Amendment or the Republican Form of Government clause of Art. IV, Sec. 4, the First Amendment does, nevertheless, guarantee the right to vote in matters that are decided by popular vote. For example, the Illinois state legislature was not constitutionally required to enact its Workmen's Compensation Act and the Congress was not constitutionally required to enact its Federal Employer's Liability Act, but once these statutes were enacted, the First Amendment protected the right of claimants to seek their benefits. See *United Mine Workers* v. *Illinois State Bar Association*, 389 U. S. 217 (1967);

and *Brotherhood of R.R. Trainmen* v. *Virginia ex rel. Virginia State Bar Association,* 377 U. S. 1 (1964).

Second, that argument involves an unwarranted assumption that the state legislature's power to direct the specific manner of choosing electors would prevail, in the event of conflict between Art. II, Sec. 1 and another provision of the Constitution. In the two recent cases where such a conflict occurred, the opposite result was reached. *Moore* v. *Ogilvie,* —— U. S. ——, 89 S. Ct. 1493 (1969); and *Williams* v. *Rhodes,* 393 U. S. 23 (1968). In *Williams* it was held that the legislative powers delegated under Art. II, Sec. 1(2) could not be exercised to regulate Presidential elections in a manner violating the Equal Protection Clause of the Fourteenth Amendment. The opinion of the Court repeatedly refers to "the right to vote," notes the reference to "the right to vote 'for electors for President or Vice-President'" in the Twenty-fourth Amendment, and holds that the impairment of "voting and associational rights . . . is an invidious discrimination, in violation of the Equal Protection Clause." 393 U. S. at 29, 33, 34.

If the right to vote for Presidential electors is rooted in the First Amendment, as we contend, then powers of the Colorado legislature under Art. II, Sec. 1, to direct the manner of choosing electors, must be exercised in a manner consistent with the First Amendment, as well as the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment.

II.

The right to vote for President and Vice-President is a privilege of national citizenship and is abridged by Colorado's residence requirement.

The right to vote for presidential electors may also be considered a privilege and immunity of national citizenship, protected from infringement by the states by the Fourteenth Amendment. *Twining* v. *New Jersey,* 211 U. S. 78, 97 (1908); *United States* v. *Moore,* 129 Fed. 630 (N. D. Ala. 1904). Cf. *United States* v. *Bathgate,* 246 U. S. 220 (1918).

The privileges and immunities of national citizenship are those rights which arise out of the nature and essential character of the Federal Government. *Twining* v. *New Jersey,* 211 U. S. 78, 97-98 (1908); *Duncan* v. *Missouri,* 152 U. S. 377, 382 (1894); *Giozza* v. *Tiernan,* 148 U. S. 657, 661 (1893); *McPherson* v. *Blacker,* 146 U. S. 1, 38 (1892); *In re Kemmler,* 136 U. S. 436, 448 (1890); *Slaughter-House Cases,* 16 Wall. (83 U. S.) 36, 79 (1873). Even though Article II, section 1(2) of the Constitution provides that Presidential electors shall be chosen "in such manner as the legislature thereof may direct," it is clear that Presidential electors exercise federal functions. *Burroughs* v. *United States,* 290 U. S. 534, 545 (1934); *Ex parte Yarbrough,* 110 U. S. 651, 662 (1884). Cf. *Ex parte Siebold,* 100 U. S. 371, 387-89 (1880). This is particularly so where, as in Colorado, the legislature has chosen to eliminate all intermediate steps between the vote of the people and the vote of the presidential elector

by requiring that the elector cast his vote for the candidate receiving a plurality in the popular election.[14]

Of course, the fact that the right to vote in Presidential elections is a federal right, and a privilege and immunity of national citizenship, does not impair the discretion of the legislature of a state to utilize alternate methods of selecting Presidential electors. See *McPherson* v. *Blacker,* 146 U. S. 1, 28-35 (1892). It does mean, however, that whatever process is used must not deny the privileges and immunities of national citizenship, including the right to vote. Thus, if a state legislature were to assume the responsibility of appointing electors, election of the appointing legislators would become a privilege and immunity of national citizenship.

III.

Denial of the Presidential franchise for failure to satisfy a durational residence requirement violates the appellants' constitutional right of interstate travel.

Colorado's refusal to permit residents of less than six months' duration to vote in Presidential elections is an impermissible burden upon the constitutionally protected right of interstate travel. The right to travel interstate "occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *United States* v. *Guest,* 383 U. S. 745, 757 (1966). See also *Shapiro* v. *Thompson,*

---

[14] Colo. Rev. Stat. 49-20-1 (5) provides as follows:

> Each presidential elector shall be required to vote for the pair of presidential and vice-presidential candidates who received the highest number of votes at the preceding general election in Colorado.

—— U. S. ——, 89 S. Ct. 1322 (1969). There has been considerable discussion as to the source of this right, and at different times it has been bottomed upon the Privileges and Immunities Clause of the Fourteenth Amendment,[15] the grant of power to Congress to control Commerce,[16] the Due Process Clauses,[17] and the concept of the Federal Union implicit in the Constitution.[18]

While restrictions upon both the right to vote and the right to travel interstate have been struck down either because they tend to inhibit the exercise of the respective right[19] or because the exercise of the right is penalized,[20]

---

[15] *Edwards* v. *California*, 314 U. S. 160, 177, 181 (concurring opinion) (1941); *Twining* v. *New Jersey*, 211 U. S. 78 (1908); *Crandall* v. *Nevada*, 6 Wall (73 U. S.) 35 (1868); *Corfield* v. *Coryell*, 6 Fed. Cas. 546 (No. 3230) (C. C. E. D. Pa. 1823); *United States* v. *Moore*, 129 Fed. 630 (N. D. Ala. 1904).

[16] *Edwards* v. *California*, 314 U. S. 160 (1941); *The Passenger Cases*, 48 U. S. (7 How.) 282 (1849); *Crandall* v. *Nevada*, 6 (73 U. S. Wall) 35 (1868).

[17] *Williams* v. *Fears*, 179 U. S. 270, 274 (1900) (Fourteenth Amendment); *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897) (Fourteenth Amendment) (dicta). *Ebel* v. *Drum*, 52 F. Supp. 189, 196 (D. Mass. 1943) (Fifth Amendment). Chaffee, Three Human Rights in the Constitution of 1787, 162 (1956). Cf. *United States* v. *Guest*, 383 U. S. 745, 769-70 (1960) (opinion of Justice Harlan, concurring in part and dissenting in part). The right to international travel has been clearly rested on Fifth Amendment due process grounds. *Zemel* v. *Rusk*, 381 U. S. 1 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Kent* v. *Dulles*, 357 U. S. 116 (1958).

[18] Chaffee, Three Human Rights in the Constitution of 1787 (1956); cf. *United States* v. *Guest*, 383 U. S. 745, 758 (1966).

[19] E.g., *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663 (1966) (right to vote); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964) (right to travel).

[20] E.g., *Shapiro* v. *Thompson*, —— U. S. ——, 89 S. Ct. 1322 (1969) (right to travel); *Harman* v. *Forssenius*, 380 U. S. 528 (1965) (right to vote).

the vice of durational residence requirements is a potential restriction upon the exercise of both rights. Either right may be exercised only if the other is surrendered. "The substantiality of the restrictions cannot be doubted. . . . Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association." *Aptheker* v. *Secretary of State,* 378 U. S. 500, 507 (1964). Likewise, the constitutional protection afforded to the right to vote by the First Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment makes it clear that the restrictions upon the right to travel are substantial.

IV.

Durational residence requirements for voting deny the equal protection of the laws to the appellants.

A state may enact laws which affect some groups of citizens differently than they affect others. *McGowan* v. *Maryland,* 366 U. S. 420 (1961). However, the selection of persons who shall be treated differently may not be accomplished in an arbitrary or capricious manner. *Baxstrom* v. *Herold,* 383 U. S. 107 (1966).

The classic equal protection test employed to determine whether a particular classification is invidiously discriminatory is whether a rational relationship exists between a permissible state objective and the exclusionary lines which are drawn to effect that objective. *Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61 (1911); *Fleming* v.

Nestor, 363 U. S. 603 (1960); *McGowan* v. *Maryland,* 366 U. S. 420 (1961).

However, where the result of the classification is to fetter the exercise of a constitutional right as fundamental as the right to travel or the right to vote for Presidential electors, a rational relationship between the objective to be served and the classification is not enough—the objective of the state must be compelling:

> The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.

Shapiro v. *Thompson,* —— U. S. ——, 89 S. Ct. 1322, 1331 (1969).

Durational residence requirements for voting have been defended on many grounds. The court below asserted two objectives to justify the exclusion of recent migrants from the presidential electorate.

The first of these is the state's interest in the "purity of elections." 292 F. Supp. at 614. The term "purity" refers to the desire to insure that only eligible persons vote.[21] Denial of the franchise for a period of six months,

---

[21] [T]he purity of elections . . . consists chiefly in affording qualified electors an opportunity to vote and have their votes counted, and in preventing those not qualified from voting. It means protection, in the exercise of this right.

Mauff v. *People,* 52 Colo. 562, 123 Pac. 101 (1912).

however, is a device far more onerous than necessary to assure that all voters are residents of the state. In striking down Virginia's requirement of filing a "certificate of residence" six months prior to the election as an alternative to payment of a constitutionally prohibited poll tax in federal elections, this Court said:

> The availability of numerous devices to enforce valid residence requirements—such as registration, use of the criminal sanction, purging of registration lists, challenges and oaths, public scrutiny by candidates and other interested parties—demonstrates quite clearly the lack of necessity for imposing a requirement whereby persons desiring to vote in federal elections must either pay a poll tax or file a certificate of residence six months prior to the election. *Harman* v. *Forssenius,* 380 U. S. 528, 543 (1965).

Colorado, of course, does not require a "certificate of residence" to be filed six months before the election. It permits an affidavit submitted contemporaneously with the application for registration to suffice. Thus, the same device that is used to establish residence is used to establish durational residence. It is difficult to see how the latter requirement is of any assistance in establishing the fact of residence.

The second objective recognized by the court below as justifying a six-month durational residence requirement was "administrative reasons" 292 F. Supp. at 614. Presumably this means the time necessary to process registration applications. It is clear, however, that remote administrative benefit to the state will not justify deprivation of a fundamental constitutional right. *Harman* v. *Forssenius,* 380

U. S. 528, 542 (1965); *Carrington* v. *Rash,* 380 U. S. 89, 96 (1965); *Oyama* v. *California,* 332 U. S. 633, 646-47 (1948).

The only occasion on which this court has dealt directly[22] with durational residence requirements for Presidential voting is *Drueding* v. *Devlin,* 234 F. Supp. 721 (D. Md. 1964), *affirmed per curiam,* 380 U. S. 125 (1965). In that case the District Court found that exclusion from the franchise was justified on two grounds. The first was to identify the voter and protect against fraud,[23] a ground similar to the preservation of "purity" asserted by the court below.

The second ground in *Drueding* was to "insure that the voter will 'become in fact a member of the community, and as such have a common interest in all matters pertaining to its government.'" [24] Of course, the relevant community in a Presidential election is a national one. One could argue nevertheless that the state has an interest in insuring that a newcomer resides for a sufficient time in the state to view the issues raised in the national election from the perspective of his new identity as a Colorado citizen. Insofar as this interest is based on what the prospective voter's political interests are likely to be, rather than upon his intellectual ability to perceive that interest, however, it is not constitutionally legitimate:

---

[22] In *Blake* v. *McClung,* 172 U. S. 239 (1898), however, the Court, while discussing the limits upon the Privileges and Immunities Clause of Article IV, Section 2, said in dicta at 256:

> So, a state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state who becomes a resident thereof shall exercise the right of suffrage or become eligible to office.

[23] 234 F. Supp. at 724.

[24] *Ibid.*

Appellants' interest in the electoral system resembles the interest of a taxpayer in the fiscal system. In a suit by a taxpayer complaining of the unconstitutionality of an expenditure by the United States, the rule is that a case or controversy exists sufficient to confer standing where, *first*, there is a "logical link" between the taxpayer's status and the type of legislation attacked, and, *second*, the legislation is challenged as being in violation of a specific constitutional limitation on the legislative powers: *Flast* v. *Cohen*, 392 U. S. 83, 102-103 (1968).

Using the same standards to assess the standing of appellants, now eligible to vote, to challenge the constitutionality of this part of the electoral system, the nature of appellants' continuing interest in the constitutionality of the residence requirement is clear.

First, there is a direct connection between appellants' status as voters and the effects of the durational residence requirement in future Presidential elections. The continued operation of durational residence requirements could affect appellants' interests in future Presidential elections in three different ways. (1) Appellants may move again and again and have their right to vote for President and Vice-President infringed by the durational residence requirement of another state. (2) As citizens of the United States, appellants are interested in the integrity of the electoral system and have a legitimate interest in maintaining an electoral system free of arbitrary and irrational exclusions and in continuing to have the benefit of citizenship in a "more perfect union," whose institutions govern with the consent of the governed. (3) As voters in future Presidential elections in Colorado, appellants have an interest, protected from abridgement by the First Amendment right

of association, in forming a political association with other people of similar political views to elect a candidate.[29] The associational rights referred to in *Williams* included not only the right of a candidate to associate with voters, but, more broadly, "the right of individuals to associate for the advancement of political beliefs" 393 U. S. at 30. The Colorado durational residence requirement will to some extent prohibit appellants' exercise of their right to associate with others for the advancement of a specific political belief: who should be President.

Second, the Colorado statute is in violation of express constitutional limitations on the exercise of legislative powers by the states in the selection of a President. If the taxing provisions of Art. I, Sec. 8 (1) of the Constitution are specifically limited by the Establishment Clause of the First Amendment, as in *Flast*, the elector selection power mentioned in Art. II, Sec. 1 (2) is specifically limited by the First Amendment rights of speech, assembly, petition and association, and by the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment. See *Williams* v. *Rhodes*, 393 U. S. 23 at 29, 31 (1968).

In a case decided without even discussing the litigant's standing, the constitutional validity of Section 4 (e) of the Voting Rights Act of 1965 was sustained against the com-

---

[29] Although the way potential voters might vote may not form the basis for restrictions by the state on the right to vote and, from the state's point of view, must be irrelevant, see *Carrington* v. *Rash*, 380 U. S. 89 (1965), it is highly important to candidates and voters and is relevant to their legitimate interests in seeking political support. See *Moore* v. *Ogilvie*, —— U. S. ——, 23 L. Ed. 2d 1, 89 S. Ct. 1493 (1969); and *Williams* v. *Rhodes*, 393 U. S. 23 (1968).

plaint of registered voters in New York that by suspending the enforcement of New York's literacy requirement as to persons with a sixth-grade education in an American flag school in a language other than English, Section 4 (e) would enable many otherwise ineligible Puerto Ricans to vote, *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966). Evidently, the interest of the *Katzenbach* plaintiffs in (1) being able to vote in an electoral system operating properly under standards designed by the state constitution and legislature, and (2) not associating politically with Puerto Ricans, was sufficient to create a case or controversy and give the plaintiffs standing. Appellant's continuing interests in this case are not materially different, and are sufficient to avoid dismissal of the case for mootness.

The issue here is raised in a context of concrete facts with sufficient detail and precision to create a clear focus on the competing interests. The competing interests have had all the illuminating benefit of an adversary presentation, so that the matter is a legitimate case or controversy. See *United States* v. *Fruehauf,* 365 U. S. 146, 157 (1961).

Because of the critical and fundamental nature of the constitutional rights involved, and because of the certainty of continued abridgement of those rights, this case should properly be decided now, rather than waiting for further injury. See *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965).

CONCLUSION

In *Ashby* v. *White*, 2 Ld. Raym. 938, 953 (1703), Chief Justice Holt, dissenting, said:

> A right that a man has to give his vote at the election of a person to represent him in parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in diverse statutes . . .

For the reasons stated, the Court should reverse the judgment of dismissal entered by the District Court and remand for entry of a proper judgment.

Respectfully submitted,

EDMUND J. WOOD
CHARLES E. EHLERT
2101 Smith Tower
Seattle, Washington 98104

WILLIAM F. REYNARD
507 American National Bank Bldg.
Denver, Colorado 80202

MELVIN L. WULF
ELEANOR HOLMES NORTON
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for Amici Curiae

July 1969